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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2001

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE L. SENDAK, As Attorney General of the State of Indiana; HAROLD R. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; and THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;

Petitioners,

v.

DONNY BRURELL BUCKLEY, and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school children residing in the area served by the original defendants herein; the UNITED STATES OF AMERICA: et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana
WILLIAM E. DAILY,
Chief Counsel
WILLIAM F. HARVEY,
Special Counsel
Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 317-232-6217

C. E. Pauley & Co., Inc., Indianapolis

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IN THE

Supreme Court of the United States

October Term, 1979

No. ————

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE L. SENDAK, As Attorney General of the State of Indiana; HAROLD R. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; and THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;

Petitioners,

v.

DONNY BRURELL BUCKLEY, and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school children residing in the area served by the original defendants herein; the UNITED STATES OF AMERICA: et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and The Indiana State Board of Education, a public corporate body (hereinafter State Defendants), respectfully pray this Court issue a Writ of Certiorari to review the Opinion

and Judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit, or 7th Circuit), issued in cause numbers 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 79-1831 through 79-1838, 79-1874, and 79-1875, on April 29, 1980, which affirmed the Opinions and Judgments of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter, District Court), entered on July 9, 1979, April 24, 1979, July 11, 1978, and June 2, 1978.[1]

OPINIONS BELOW

The opinion of the Seventh Circuit issued on April 29, 1980, has not been officially reported. It may be found in the Joint Appendix, which was filed with the Metropolitan School District for Perry Township, at page A1 (hereinafter referred to as Joint Appendix, or J.A.).

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1. The parties in the Seventh Circuit who are considered respondents herein are:

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, INDIANA; and THE INDIANA STATE TEACHERS ASSOCIATION,

Respondents.

The relevant decisions of the United States District Court which gave rise to the appeal to the Seventh Circuit may be found in the Joint Appendix, A130, A101, A84.

Other decisions in this case in this Court and in the Seventh Circuit and in the District Court are referred to under JURISDICTION, infra.

JURISDICTION

The judgment and opinion for the Seventh Circuit were entered on April 29, 1980. No petition for a rehearing was filed. The Seventh Circuit entered a stay of its mandate at petitioners' request, until June 30, 1980. This petition for certiorari was timely filed within ninety (90) days of April 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Rule 19(1)(b) of this Court.

This Court last exercised jurisdiction over this case in *Bowen, et al. v. United States, et al.*, 429 U.S. 1068 (1977), and in No. 76-520 and No. 76-522, therein. There the Seventh Circuit judgment and opinion at 541 F.2d 1211 (1976), were vacated, and the case was remanded to the Seventh Circuit with instructions to reconsider the case in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1977).

The Seventh Circuit issued another opinion without further trial or evidence at 573 F.2d 400 (1978),[2] and remanded the case to the District Court. The petitioners here sought review of the Seventh Circuit decision and judgment at 573 F.2d 400 (1978), which this Court denied in No. 77-1614, 99 S.Ct. 93 (1978).

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2. J.A. A54.

The District Court issued another opinion without further trial or evidence at 456 F.Supp. 183 (S.D.Ind. 1978).[3] The petitioners here sought a writ of certiorari to the District Court opinion(s) which was denied, in No. 78-413, at 99 S.Ct. 571 (1978).

Appeals were effected to the Seventh Circuit from 456 F.Supp. 183 (S.D.Ind. 1978), and that court eventually ordered a limited remand for the purpose of considering alternative remedy proposals.

In November 1978, the District Court conducted another trial and made additional findings, and entered judgments and opinions on April 24, 1979, and July 9, 1979, which are not reported (Joint Appendix at A-101 and A-130). Jurisdiction to review the 1979 District Court judgments and opinions was established under 28 U.S.C. 1291; also brought before the Seventh Circuit for the review were the 1978 District Court judgments and orders.

The judgment and opinion for the Seventh Circuit was entered on April 29, 1980. The jurisdiction of the District Court is set out in the "Statement of the Case."

QUESTIONS PRESENTED FOR REVIEW

There are three principal questions presented in this petition. They are:

(1) Whether the Seventh Circuit erred in sustaining the District Court's busing orders entered against six (6) unitary and integrated school districts, for the purpose of transferring students from a segregated school system, when the District Court found, and the Seventh Circuit affirmed, that none of the effects of school segregation in the segregated school system would support the busing

3. J.A. A84.

orders (and thus the subsidiary orders) which the District Court adopted?

(2) Whether the Seventh Circuit erred in holding that the District Court has judicial power to remove school children from an integrated school district, and place them in a segregated school system?

The lower federal courts have held that the segregated school system can be integrated within its boundaries, and that none of its segregation would support an order entered against any of the integrated school districts or systems.

(3) Whether a public school student has a Constitutional right to attend an integrated school in his or her school district, and not be transported to a school system which is segregated?

The holding of the majority opinion in the Seventh Circuit was that public school children do not have that right, which is contrary to the holdings in this Court.

In the context of this Court's case law and Constitutional interpretations, and compared with a holding in the United States Court of Appeals for the 4th Circuit, those questions are stated in serial form, as follows:

(1) Is the majority opinion and judgment of the Court of Appeals, April 29, 1980, consistent with this Court's decision and law in *Milliken v. Bradley,* 418 U.S. 717 (1974)? This Court held, in part, that a public school student has a constitutional right to attend an integrated school in his or her school district, 418 U.S. 746-47, and that a District Court can not impose an order on an integrated school district, which was found not to have committed a constitutionally illegal act of segregation and in which there was no effect of illegal segregation from another segregated school system.

The 7th Circuit majority opinion affirmed the District Court's order of busing students to an integrated school district, and it additionally held and advised the District Court that it, the District Court, can remove students from an integrated school district and place them in a segregated school system which segregated school system the District Court, after nine (9) years of litigation, has not yet ordered to be integrated.

(2) Is the majority opinion and judgment of the 7th Circuit, April 29, 1980, consistent with the opinion and judgment of the United States Court of Appeals for the 4th Circuit in *Bradley v. School Board of City of Richmond, Virginia,* 462 F.2d 1058 (4th Cir. 1972), affirmed by divided vote, 412 U.S. 92 (1973)?

(3) Did the majority opinion and holdings of the 7th Circuit on April 29, 1980, and at 573 F.2d 400 (7th Cir. 1978), sustaining the opinions and orders of the United States District Court at 456 F.Supp. 183 (S.D.Ind. 1978) (J.A. A84`, and April 24, 1979 (J.A. A-101), and July 9, 1979 (J.A. A-130), conform with this Court's case law, and its order on remand to the 7th Circuit, which is found in *Bowen v. United States,* 429 U.S. 1068 (1977), and in No. 76-520, and No. 76-522 therein?

That question was raised in a petition for certiorari No. 77-1614, 99 S.Ct. 93 (1978), which was then denied, and which is now ready for review. This Court should exercise its power of supervision over the 7th Circuit and the District Court, and reverse their decisions on important federal questions which have been decided contrary to the applicable decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon are Section 1 the Fourteenth Amendment to the Constitution of the United States; and Indiana statutes and statutory provisions which are found in the Joint Appendix at pages A-138—170.

STATEMENT OF THE CASE

I

The Case Presented In This 1980 Petition, in a "Nutshell"

Marion County, Indiana, consists of about 400 square miles. It contains eleven (11) independent public school systems, which are the subject of this litigation. Their existence dates back over 100 years in their present form, or in the form of their respective predecessor school systems. Their combined 1978-79 enrollment was 144,226 students.

The largest among the public school systems is the Indianapolis Public School System (hereafter IPS), which was found to be a segregated school system in 1971. A final order of integration has not been entered.

The remaining ten (10) school systems or districts consist of eight (8) township school districts, and a school system for the City of Beech Grove, Indiana, and the Town of Speedway, Indiana. These school systems have been found to be integrated school systems, and they were never segregated school systems in their history. Two of the school systems, which are township school districts, were dismissed from this case because of the high percentage of black students which enrolled in them in the 1970s.

The District Court held on April 24, 1979, that:

> "In summary, it cannot be demonstrated that acts of *de jure* segregation practiced by one school corporation [IPS] within its own boundaries have any significant effect upon school or residential populations in adjoining school corporations." [the other ten (10) school systems]. (Joint Appendix at page 113).

The Seventh Circuit on April 29, 1980, affirmed that finding and it said:

> "We therefore do not disturb the finding that the the effects of school segregation within IPS cannot support the city-wide [the court meant Marion County-wide] desegregation plan ordered by the district court." (Joint Appendix at page A-18).

Nevertheless the Seventh Circuit affirmed interdistrict busing orders from the segregated schools of IPS to the integrated schools, and it held that the District Court can order or bus school children from the integrated schools and place them in the segregated schools of IPS, and it affirmed, generally, the State's duty to pay for support systems for this entire program. The reason for those orders has to do with the civil government in Marion County, and the placement of certain units of public housing in the 1960s.

Marion County, Indiana, also contains the City of Indianapolis, Indiana, which has a full municipal function, and a limited municipal function. The full municipal function of the City is limited to what is called the "old city" which is coterminous with the school boundaries of IPS. The limited municipal function of the City extends into all of Marion County, Indiana, with the exception of the City of Beech Grove, and the Town of Speedway.

The difference between the "full and the limited municipal function" is found in a state statute called "Uni-Gov",

Indiana Code (I.C.) 18-4-1-1,[4] et seq. effective anuary 1, 1970. It provided that some of the municipal functions in the City and County would be combined, and some were not. Among those which were not were police and fire protection, the airport authority and board; the health and hospital corporation and board; the county welfare department and board; the county home board; the building authority, the board of trustees and board of directors; capital improvements board of managers; the housing authority; the library districts and boards; and the eleven (11) school corporations.

The District Court has held that the failure to create but one school system for all of Marion County, Indiana, or that the exclusion of the school systems from that statute, is a basis for imposing an interschool-district busing remedy, and the Seventh Circuit affirmed that conclusion.

The District Court has found that the placement or location of certain units of public housing in the area of the City of Indianapolis where a full municipal function is in effect and which is the territory of IPS, in the 1960s, would support a limited interschool-district busing remedy. The Seventh Circuit has affirmed but it said that if that were the only "violation present in this case, an appropriate remedy on this record would have to be limited to the territory [of the building authority's] area of operation at the time the projects were built." (Joint Appendix at page A23).

The District Court has ordered, and the Seventh Circuit affirmed, that the State of Indiana shall pay for certain "ancillary relief" for the busing programs. The estimated cost of that "ancillary relief" runs into million of dollars.

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4. J.A. A154.

The Seventh Circuit held that the District Court had power to order students into a segregated school system from an integrated school system, although there is no such District Court order.

All of those orders were made in direct confrontation with the findings by both lower courts that there was no effect or impact from the segregated school system into the integrated school systems, and in direct confrontation with the findings that the school systems of Marion County, Indiana, except IPS, are all integrated systems.

The principal basis for these orders in the Seventh Circuit's opinion, one judge dissenting, was the unspecified "significant segregative impact" of actions taken by the State of Indiana (J.A. at page A24). The gist of this idea is that there should have been, after 1970, just one school system in all of Marion County, Indiana, for all of those 144,226 students of today. The failure to do that had to mean illegal segregation, in the thinking of the majority of the Seventh Circuit, regardless of the factual findings to the contrary.

The evidence in this record from official State School Enrollments Reports, and from the U.S. Bureau of the Census, shows a very substantial movement of minority and especially black persons into the suburbs of Indianapolis, in Marion County, Indiana, and a huge increase of minority and especially black students in several of the Township School Districts. All of this occurred during the 1970s, or the life of Uni-Gov. The District Court seemed to understand this development, in part at least, because it ordered the dismissal of the Washington and Pike Township Schools from the case, which the Seventh Circuit also affirmed.

The petitioners pray for a writ of certiorari to the Seventh Circuit because, in essence, that court's opinion on the findings which were made and which it accepted, destroyed the Court's opinion and decision in *Milliken v. Bradley,* 418 U.S. 717 (1974), and in *Brown v. Board of Education,* 347 U.S. 483 (1954), in the jurisdictions covered by the Seventh Circuit, and because it is contrary to a holding by the United States Court of Appeals for the 4th Circuit, in *Bradley v. School Board of the City of Richmond, Virginia,* 462 F.2d 1058 (1972), affirmed by divided Court, 412 U.S. 92 (1973).

II

Course of the Proceedings Below

A.

From 1968 to 1971—Indianapolis I

The United States commenced this action in 1968 under §§ 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6(a) and (b), against the Board of School Commissioners of the City of Indianapolis, Indiana (IPS), an independent governmental entity, and the only defendant in the case at that time, where the "sole issue" was racial segregation within IPS. After a long trial the District Court found that IPS was "operating a segregated school system wherein segregation was imposed and enforced by operation of law, . . ." 332 F.Supp. 655, at 677, 678. That judgment was affirmed on appeal on February 1, 1973, 474 F.2d 81, and certiorari was denied, 413 U.S. 920 (1973). (The petitioners herein were never parties to that proceeding in any manner; they did not receive notice of the proceeding or participate in the appeal. Nevertheless, in 1973, they were held bound by those findings, as shown below.)

At that time, the Indianapolis Public School system had

a 1971 student enrollment of 102,551 students with a white and black ratio of about 60% white and 40% black. It was one of the largest school systems in America; only 1.001% or 180 of those systems, like IPS, had a student population over 25,000. Its assessed valuation was $935,000,000, and it had the financial capacity to raise over $100,000,000 should it have decided to do so.

It could have been easily desegregated within IPS and that remedy should have been ordered by the District Court, because it would fit the scope of the violation found, but it was not.

The District Court had determined that if it ordered desegregation "now", as instructed in *Green v. County School Board of Kent County, Virginia,* 391 U.S. 430 (1968), and in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), and see *Pasadena Board of Education v. Spangler,* 427 U.S. 424 (1976), then it would not last "forever". As Judge Tone stated in his 1980 dissent, (Joint Appendix A-29) the District Court in 1971 commenced "a search for an elusive constitutional violation capable of supporting an interdistrict remedy . . ." The District Court thought that those violations could be found in the enactment of Uni-Gov and in the placement of certain units of public housing.[5]

The District Court noted that it could order "exact racial balancing" in each IPS school, but did not do so because

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5. Some members of this Court have commented upon the apparent disregard of its remedy law and decisions by lower federal courts, in *Estes v. Metropolitan Branches of Dallas NAACP,* 100 S.Ct. 716 (1980) (Justices Powell, Stewart and Rehnquist); in *Cleveland Board of Education v. Reed,* 100 S.Ct. 1329 (1980) (Justices Rehnquist, the Chief Justice, and Powell); and in *Delaware State Board of Education v. Evans,* 48 L.W. 3696 (1980) (Justices Rehnquist, Stewart and Powell).

"in the long haul it won't work", 332 F.Supp. at 676, and later that court stated:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of I.P.S. on a 58.9% —41.1% basis, or some similar thereto, so that no school could, for the time being, be racially identifiable as a black school . . ." 368 F.Supp. at 1198.

B.

Indianapolis II—1971 to 1973

The part of this litigation which the District Court has characterized as "Indianapolis II" was organized during the months of August through October of 1971.

On August 18, 1971, the District Court issued its decision at 332 F.Supp. 655, which raised the questions: (1) whether there was state imposed segregation in the statutes which were enacted with the adoption of Uni-Gov, in not extending IPS county-wide in Marion County, 332 F.Supp. at 679 (Court questions Nos. 1, 2, and 3); and (2) whether the placement of units of public housing in the boundaries of IPS was an act of segregation, 332 F.Supp. at 679, (Court question No. 7).

Additionally, the District Court ordered the plaintiff United States to file appropriate pleadings to secure the joinder of additional school corporations, in and out of Marion County, but the United States failed to file any claims or complaints against them. Because of the refusal of the United States to follow the District Court's instructions, the Court allowed, on September 14, 1971, two plaintiffs, the Buckleys, to intervene as plaintiffs representing a class of school age Negro children and to file a complaint seeking relief against all other school corporations in Mar-

ion County. An amended complaint was filed on October 21, 1971, against the Governor of Indiana, the Attorney General, the Superintendent of Public Instruction, and the State Board of Education, and several school corporations of Marion County, Indiana. Paragraphs 9 and 10 in the Amended Complaint framed the issue relating to Uni-Gov, which had been posed in the District Court's opinion in August 1971, that the petitioners and the other defendants had committed discriminatory acts, and that Uni-Gov as "further implemented" by Acts 1961, Chapter 186, and Acts 1969, Chapter 52, was unconstitutional.

Indianapolis II had begun. The issues were tried in the District Court in June and July 1973. Those issues, however, had a strange evolution. On December 30, 1971 the District Court ruled that the defendants were not bound by the findings and evidence of the preceding trial and they could be contested by the new defendants. An entry in the District Court on February 2, 1973, limited the issues to those formed by the amended complaint, and one day before trial on June 11, 1973, the district court ruled that the findings in *Indianapolis I* were *res judicata* in the second trial. Those findings were then imputed, at the conclusion of the 1973 trial, to the State Defendants.

The District Court entered remedy orders against all of the added defendant school districts or corporations, even though it *found* that there were no acts of *de jure* segregation attributable to any of the added defendant school districts or corporations, 368 F.Supp. 1191 at 1203, affirmed, 503 F.2d 68 at 79 (7th Cir. 1974). *That finding has not been contested by any party in these entire proceedings,* and was restated by the District Court on April 24, 1979 (Joint Appendix A-114), and affirmed by the 7th Circuit on April 29, 1980 (Joint Appendix A23-24).

The District Court in 1973 did enter findings against the Indiana State Board of Education and the Superintendent of Public Instruction, which were that the placement by IPS of three high school buildings constituted *de jure* acts of segregation (this matter was litigated in the 1968-71 dispute), and they were "imputed" to the State Defendants. No other specific findings were entered against the State Defendants.

The 1973 decision by the District Court effected a change in the court's theory of the case. In 1971 the District Court, in the absence of any evidence or briefing by any of the parties to the suit, postulated a complex theory of the unconstitutional effects of the 1961 and 1969 statutes, including Uni-Gov,[6] as a basis for the questions to be determined in *Indianapolis II* which it had then organized. That theory was based on an assumed coterminous nature of school and civil boundaries in Indiana prior to 1961, and the purported change in the relationship effected by the statutes. The court's analysis was incorrect because it did not know or understand that the School Corporation Reorganization Act of 1959, mandated a procedure for establishing fixed school boundaries independent of the boundaries of any city or civil municipal corporation.

Nevertheless the District Court in 1971 had postulated the theory that school and civil boundaries were coterminous, and that they had not been that in and after the enactment of Uni-Gov, and that the explanation had to be in some kind of invidious act, if only it could be discovered or concluded with a reasonable expectation that such a conclusion would receive Rule 52 affirmance.

In the 1973 opinion, however, the trial court stated those

6. J.A. A138 to A170.

statutes on the public schools, their reorganization, and Uni-Gov were a "quibble about the effect of certain school laws passed in 1961 and thereafter", 368 F.Supp. at 1199, and the District Court concluded that "in view of the Court's other findings and conclusions, it is unnecessary to consider the unconstitutionality of . . . [the 1961, and 1969 state statutes on public schools and Uni-Gov], 368 F.Supp. at 1208, and the principal reason for *Indianapolis II* was thus held to be insignificant.

The position taken by the United States at that trial in 1973 was that:

> "Our analysis of that legislation persuades us that any inferences of unconstitutional purpose or effect that might be drawn on the present state of the record would be tenuous. Moreover, there does appear to have been some legitimate interests involved which provide justification for the exemptions of school districts from the Uni-Gov consolidation.
>
> Further, we have seen no evidence of segregatory acts perpetrated by the state defendants [the petitioners here]. The pre-1949 legislation allowing school segregation undoubtedly contributed to segregation within IPS, but no evidence indicated that it was the proximate cause of any racial disparity in enrollments as between the defendant school districts." (Trial transcript 1973, page 2819, Mr. Graves).

Thus in 1973 the principal plaintiff denied both racial and invidious motivation in the enactments, and causation or causal effect either from those statutes, or from pre-1949 history. It was "not for nothing" that the District Court's 1971 theory was changed by 1973.

The new 1973 theory was the Sixth Circuit's opinion in the Detroit litigation, which this Court overturned in *Milliken I*, supra.

The lasting significance of the 1973 change in District Court theory meant that the case would be litigated seemingly indefinitely, because it had become a litigation not directed at factual questions of racial discrimination and the absence of it. It had become a litigation directed at a constantly shifting theory of liability which, as Judge Tone noted in his 1980 dissent, might support the District Court's remedy. The practical result was that no final program for the integration of IPS would be entered in the 1970s, and none was.

The State Defendants have repeatedly asked the District Court and the Court of Appeals that this be stopped, and that a final plan for the integration of IPS be entered. This Court was advised of this situation in 1976 by the Solicitor General of the United States on brief, who said:

> The United States commenced this suit to challenge racial discrimination by and within IPS. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students." Page 11, No. 76-515, brief of the Solicitor General.

That analysis was cited by Judge Tone, 573 F.2d at 416, fn. 3, after remand from this Court at 429 U.S. 1038, and the statement by the Solicitor General was made to this Court after the 1975 trial. It was agreed to by the District Court in its April 24, 1979 opinion: there are no effects of the segregation by IPS in any other school district, and the 7th Circuit affirmed that conclusion in its April 29, 1980 decision. In short, four (4) federal judges and the

Solicitor General of 1976 have found and agreed that the segregation in IPS has had no impact and no causal effect in any of the other school systems in Marion County, Indiana.

However that may be, a substantial inter-district busing program has been ordered, and the power to remove school children from their integrated schools and place them in a segregated school has been affirmed by the 7th Circuit.

The case thus returns to *Indianapolis III and IV*.

C.

Indianapolis III and IV—The 1975 Trial

On December 6, 1973 the District Court issued a supplemental memorandum of decision, containing certain "guidelines" for the Indiana State Legislature, and it vacated the multi-district and multi-county busing orders, but continued its "in service training courses" for faculties and their staff. See generally, 368 F.Supp. 1223 (S.D.Ind. 1973), called *Indianapolis III*, by the courts below.

The District Court certified the busing orders and conclusions of law in *Indianapolis II* for appeal to the 7th Circuit, the appeal was taken, and the 7th Circuit issued its 1974 opinion, at 503 F.2d 68 (1974). The Court of Appeals: (1) affirmed the findings imputed to the State Defendants; (2) reversed the trial court's findings and orders "insofar as they pertain to a [busing] remedy beyond [Marion County Schools]"; (3) observed that none of the school defendant corporations were segregated, other than IPS, 503 F.2d at 79; (4) and vacated the trial court's ruling and orders "insofar as they pertain to a remedy within the boundaries of [Marion County Schools]", and (5) remanded the case to the district court "for further proceed-

ings consistent with" the decision in *Milliken v. Bradley,* 418 U.S. 717 (1974). The District Court was directed to "determine whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken." 503 F.2d at 86. Certiorari was denied at 421 U.S. 929 (1974).

Thus the Uni-Gov theory was revived, and reentered the case for trial which was held in 1975. The result of that trial was *Indianapolis IV*.

In a pre-trial entry of December 13, 1974 the District Court stated, inter alia, that:

> "the remaining issues appeared to be, at a minimum, the following: (a) The effect, if any, of the passage of the 'Uni-Gov' Act in perpetuating de jure segregation within the boundaries of IPS, and (b), the effect, if any, of housing and zoning law, rules, regulations, and customs in Marion County, Indiana, and its various political subdivisions upon the de jure segregation of IPS"

In March of 1975 trial was held, and a decision was given on August 1, 1975, 419 F.Supp. 183 (S.D.Ind. 1975). The District Court's disposition then contained a number of generalized and sweepingly conclusory statements without citation to any subsidiary facts or record evidence to support them.

The statements which related to public housing as developed by the Housing Authority of the City of Indianapolis were that because of the location of certain housing projects in IPS the State of Indiana "tended to cause and to perpetuate the segregation of black pupils in IPS territory". 419 F.Supp. 180, 182. There was no finding that the housing projects found in the territory of IPS caused inter-

district segregation, or caused racial segregation in any additional Marion County school district or system. There could not have been such a finding because the evidence showed then, as now, that minority students have moved into the additional Marion County school districts in massive numbers.

The same kind of treatment was given to the "Uni-Gov" issue. The District Court found that Uni-Gov inhibited desegregation within IPS because there had not been, in 1969, an establishment of the boundaries of IPS countywide. There was no finding that Uni-Gov *caused* inter-district segregation, but "Uni-Gov's failure", so to speak, served as a predicate for "a limited inter-district remedy within all of Marion County, Indiana, as hereafter described." 419 F.Supp. at 183.

This should be carefully noted, at this point. The District Court said, in effect, in 1975, that the Indiana Legislature's failure to organize a school system for Marion County, Indiana, which would be consistent with the District Court's idea of a school system for Marion County, Indiana, authorized the District Court's inter-district busing program.

It was not that the schools in Marion County, Indiana, other than IPS, were segregated. It was not that minority and especially black students were not moving into those schools in the years of Uni-Gov. The District Court in its 1975 opinion excluded two township school systems from its orders, Pike and Washington Township Schools, because of their rapidly expanding enrollment of minority students, and the racial mix found in those schools. Those township school systems then and now cover a population and a territory also covered by a part of the municipal function of the City of Indianapolis, or of Uni-Gov. It was, simply, that it would have been easier for the District

Court to move or transfer school children if there was but one school system in Marion County, Indiana, which, if so, would have been one of the very largest in the United States.

The 1975 remedy of the District Court would have been to transfer a sufficient number of black students to transferee school systems to cause a total black enrollment of pupils in each of the transferee school systems to be set at approximately 15% black. 419 F. Supp. at 185.

If in this case a remedy had followed a wrong, or was ever tailored to a liability finding of causal discrimination, which has never been made of course, then it would mean that somewhere in Uni-Gov and in the location of ten (10) units of public housing, there was some act or effect which prevented exactly 15% enrollment of blacks in each of the school corporations of Marion County, Indiana. Such a supposition about the movement of populations is, however, incredible.

The transfer orders were stayed by the 7th Circuit, and in 1976 it affirmed the District Court, by a two to one decision, Circuit Judge Tone dissenting.

The majority saw the issue, it said at 541 F.2d 1211, 1218, as whether the "limited interdistrict remedy ordered by the district court is supported by the record" and that issue subsumed the "two questions: (1) whether the establishment of Uni-Gov boundaries without a like restablishment of IPS boundaries warrant[ed] an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined" locating any additional publicly funded housing projects within IPS.

The majority decision observed that "Uni-Gov was a neutral piece of legislation on its face with its main purpose

to efficiently restructure civil government within Marion County" but that it had to be analyzed by its impact on school district boundaries to be clearly perceived. The opinion said that the Indiana General Assembly knew that this suit was pending in the District Court at the time Uni-Gov was enacted, although there is nothing in the entire record to indicate just how such knowledge was known, and it said that the "record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation." 541 F.2d at 1220.

The essence of the dissent by Judge Tone was that there was no finding and no evidence in this now-massive record to show that the exclusion of IPS from Uni-Gov was racially motivated, and that by all other objective criteria Uni-Gov was racially neutral. 541 F.2d at 1227.

This Court vacated that decision, 429 U.S. 1068 (1977), and on remand the 7th Circuit issued another decision on the 1975 trial record.

In this decision at 573 F.2d 400 (1978), Uni-Gov, which had been "a neutral piece of legislation on its face" had become, on the same record, apparently invidious:

> "we hold that the passage of Uni-Gov and its companion legislation meets the requirements of Milliken and therefore . . ." 573 F.2d at 408

could be a basis for an interdistrict remedy, if the trial court found that it was enacted with a discriminatory purpose. Here too, the 7th Circuit concluded that a finding of nondiscrimination, or the presence of an integrated school district, was not significant and that if the state had committed an act of segregation, then that was sufficient to impose a remedy because the school districts existed in the state, 573 F.2d at 410.

Circuit Judge Tone again dissented, because there was no evidence that would support a finding of racially discriminatory purpose with respect to either Uni-Gov or the selection of public housing sites. The State Defendants pleaded with the 7th Circuit to remand the case, order IPS to be integrated, and conclude the litigation. That was denied; and certiorari by this Court was also denied at 99 S.Ct. 93 (1978). The case was remanded to the District Court, and the stage was set for *Indianapolis V and VI.*

D.

Indianapolis V and VI—1978-1980

Indianapolis V, consisted, in the main, of two District Court decisions, which were issued on the prior record. On June 2, 1978, the District Court reinstituted its interdistrict busing orders of August 1, 1975, again asserting that the only practical way to desegregate IPS was interdistrict busing, and on July 11, 1978 the District Court issued another opinion, 456 F.Supp. 183, and held that Uni-Gov and another 1969 statute on school annexation were adopted with a racially motivated purpose, and that the location of certain public housing projects in IPS was also racially motivated. The busing orders of August 1, 1975, 419 F. Supp. 180, were reinstated.

In *Indianapolis V,* the District Court made no finding of an interdistrict impact or an incremental effect of Uni-Gov, and it relied solely on the 7th Circuit's opinion of 1976. It reentered its order of 419 F.Supp 180, which had been affirmed by the 7th Circuit, 541 F.2d 1211 (1976), which this Court vacated, 429 U.S. 1068 (1977). For that reason, the State Defendants sought a writ of certiorari in advance of an appeal to the 7th Circuit, in No. 78-413, which was denied at 99 S.Ct. 571 (1978).

Additional appeals were taken to the 7th Circuit, which resulted in *Indianapolis VI*. That consisted of another trial in November 1978, and the District Court's opinion on April 24, 1979 (Joint Appendix A101). At that trial, the State Defendants presented very substantial evidence showing the significant movement of blacks into the suburban areas of Indianapolis, and into those school systems in the 1970s.

In that decision the District Court found as a fact (1) that "it cannot be demonstrated that acts of de jure segregation practiced by one school corporation [IPS] within its own boundaries [had] any significant effect upon school or residential populations in adjoining school corporations", (Joint Appendix A113) and (2) "there is no evidence that any [suburban school corporation] has operated anything other than a unitary school system." (Joint Appendix A114) These findings were expressly affirmed by the 7th Circuit, on April 29, 1980. (Joint Appendix A18, A23).

They should have concluded the case, but the District Court's orders for busing, for in-service training programs in all school districts with the "balance . . . paid by the defendant State of Indiana out of funds otherwise unappropriated" were affirmed, and the 7th Circuit offered an advisory opinion that the District Court could effect busing from integrated school systems to segregated school systems.

The finding by the District Court that there were no interdistrict effects of IPS segregation came in rejection of identified evidence offered by IPS. The evidence offered by the State Defendants massively supported that finding, and the position taken by the State Defendants in over nine (9) years of litigation was sustained.

The "litigation of theories" introduced into the case by the District Court in 1973 seemingly had ended, and it did end factually.

Nevertheless, the District Court, disregarding the critical facts which it had found, entered the interdistrict busing orders, and the 7th Circuit affirmed. And more. The 7th Circuit's opinion concluded that the District Court could transfer or bus school children from integrated schools into the segregated schools of IPS.

The State Defendants pray for a writ of certiorari to the 7th Circuit decision on April 29, 1980, because it seems clear that this Court's opinions in *Milliken v. Bradley, I*, supra, and in *Brown v. Board of Education,* 347 U.S. 483 (1954), holding that a school student has a constitutional right to attend an integrated school in his school district, are no longer the law in the 7th Circuit.

III

FACTS MATERIAL TO THE QUESTIONS PRESENTED

A.

In the nine (9) school years since August 1971, over 1,000,000 students have been enrolled in the public schools in Marion County, Indiana. Not one person, not one student has ever stated that he or she was excluded from, or assigned to, any public school in any of the ten (10) public school systems, and not IPS, because of the race of that person, or student.

B.

The District Court twice has found that the public school systems in Marion County, Indiana, other than IPS, are unitary and integrated school systems. The

Seventh Circuit twice has affirmed those findings. See, first, 368 F.Supp. 1191 at 1203 (1973), affirmed, 503 F.2d 68 at 79 (1974); and, secondly, the opinion in the District Court, April 24, 1979 (Joint Appendix A114), and in the Seventh Circuit, April 29, 1980 (Joint Appendix A23).

C.

The District Court has found, and the Seventh Circuit has affirmed, that acts of de jure segregation practiced by IPS in its own boundaries did not have any "significant effect upon school or residential populations in adjoining school corporation" (Joint Appendix at pages A113 and A18).

D.

The evidence in this case, produced in each trial, shows major movements of minority and especially black persons and students into the suburban areas of Marion County, and into the school systems in the County. The District Court itself recognized this in its April 24, 1979 opinion where it observed that "the number of black children in suburban schools has increased from 1,220 in the school year 1968-69, the last year before Uni-Gov, to 4,392 in the current year—1978-79—an increase of 360% (Joint Appendix A109-110).

E.

The District Court has frequently held and said that a final desegregation plan could be, and could have been, entered for IPS, but it was not, see, *e.g.*, 368 F.Supp. 1191 at 1198 (1973). In the 1970s the State Defendants requested that court action, but it was delayed or denied, see *e.g.*, "State Defendants Statement of Position" on Remand from this Court, in the Seventh Circuit, 1977, pages 18-19. A final plan appears to have been ordered by the Seventh Circuit in its April 29, 1980 opinion (Joint Appendix A28).

REASONS FOR ALLOWING THE WRIT

I.

The Remedy Imposed By The District Court Is Not Related To The Findings of Fact Which That Court Made, and The Judicial Power Asserted By The Seventh Circuit Destroys The Constitutional Rights Of Students Who Attend Integrated Schools In Marion County, Indiana, and Important Federal Questions Have Been Decided In A Way Which Is In Conflict With Decisions In This Court.

A.

The Constitutional Rights Involved

(1) *Right Defined.* A public school student has a Constitutional right to attend a unitary school in his or her school district or system, *Milliken v. Bradley,* 418 U.S. 717, 746-747 (1974); *Brown v. Board of Education,* 347 U.S. 483 (1954).

(2) *Purpose and Policy In That Right.* The purpose of this right, and its stated policy of support "is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice", *Swann v. Board of Education,* 402 U.S. 1, at 23 (1971). The reason for that distinction is that, it is said by this Court, public education is of great significance to students enrolled in public schools, and it is believed that in those schools they will be prepared to face their social duties and responsibilities in life, see *Brown v. Board of Education, supra.*

(3) *Remedies for the Right.* A desegregation decree "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they

would have occupied in the absence of such conduct'." *Milliken v. Bradley,* 433 U.S. 267 at 280 (1977). It is thus imperative that lower federal courts, and plaintiffs and state officials, identify the link between (a) the constitutional violation and (b) the desegregation remedy which is imposed.

There is perhaps no greater duty, given the nature of the right and the number of persons affected, on lower courts and public officials, than to make certain that the remedy is directly and factually connected with the violation found, if any. The failure to do this, Mr. Justice Powell has observed, can mean "a haphazard exercise of equitable power that can 'like a loose cannon, inflict indiscriminate damage' on our schools and communities." *Estes* v. *Metropolitan Branches of Dallas NAACP,* 100 S.Ct. 716 at 720 (1980).

B.

The State Defendants and the Facts Here

The lower courts have found that segregation exists in IPS, but not in any other school district or system in Marion County, Indiana, all of which are integrated school districts.

The lower courts have found that there was no causal or incremental effect of the segregation in IPS in either the schools, or residentially, in the other school districts in Marion County, Indiana.

They have held, however, in disregard of those findings, that in 1969 Indiana should have created but one school district for all of Marion County, Indiana, when Uni-Gov was enacted. They have held, in effect, that the State of Indiana had a duty to spread the segregation of IPS into all of Marion County, Indiana, and thus deny and destroy

the integrated schools there, and the right of the school children who attend those schools.

The State Defendants vehemently deny that, and have shown that there is no duty to do that, and there was none, and that no factual basis for such a position ever existed.

They have shown that neither the enactment of Uni-Gov nor the placement of public housing units, the latter of which was not performed by the State Defendants or the State of Indiana, violated any constitutionl rights of any person or student, and, strangely, the District Court and the Seventh Circuit agreed with that. They simply entered the orders anyway, but as Circuit Judge Tone said in his last dissent:

> "The Record no more supports today than it did four years ago the thesis that either the passage of Uni-Gov or the actions of the Housing Authority were tainted by discriminatory purpose." (Joint Appendix A30).

II

The Opinion In The Seventh Circuit Is In Conflict With An Opinion in the Fourth Circuit.

In *Bradley v. School Board of the City of Richmond, Virginia,* 462 F.2d 1058 (1972), affirmed by divided vote, 412 U.S. 92 (1973), the Fourth Circuit stated the question in that case as follows:

> "What is presented on appeal is whether the district court may compel joinder with Richmond's unitary school system two other school districts (also unitary) in order to achieve a greater degree of integration and racial balance." 462 F.2d at 1061.

The Fourth Circuit held, for the reasons there stated in full in the opinion, that the district court erred.

It would be difficult to find a description about this case more accurate than the Fourth Circuit's description about *Bradley,* except here the joinder of IPS with the other Marion County School Districts would be to join a segregated school system, IPS, with unitary school systems which were never other than unitary systems, unlike the counties of Henrico and Chesterfield in Virginia.

And here, unlike the area of Richmond, Virginia, several years ago, there is a very significant movement of minorities and especially blacks into the county school districts and systems.

In *Bradley,* the court held that Virginia had no duty to remedy de facto racial imbalance among those three systems. Here, the Seventh Circuit has held that Indiana did have that duty.

Circuit Judge Tone said in dissent:

> "Indiana acted to improve municipal government and to provide decent housing for persons of limited means in a manner that would promote integration in housing. Because Indiana did not include in its government-structure and housing reforms a program of affirmative action with respect to de facto segregation, which if included would have made the reforms themselves impossible to carry out, Indiana has been found to have intended a school segregation it did not create." (Joint Appendix A52).

The State Defendants here have assisted in maintaining integrated schools in Marion County, Indiana, all during the course of this litigation and for many years before, and long before the year 1954. They have sought the integration of IPS, in IPS.

CONCLUSION

The State Defendants desire to continue those programs, and those integrated schools, and they desire that IPS become an integrated school, and they believe that that is the law and policy established by this Court.

It is not the law or policy established by the Seventh Circuit, and for that reason they pray for this Writ.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM E. DAILY,
Chief Counsel

WILLIAM F. HARVEY,
Special Counsel

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 317-232-6217

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